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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MERCURY INSURANCE COMPANY,

Plaintiff and Respondent,

v.

ROGER E. NAGHASH,

Defendant and Appellant.

D070690

(Super. Ct. No. 30-2012-00599953)

APPEAL from a judgment of the Superior Court of Orange County, Craig Griffin,
Judge. Affirmed.

Roger E. Naghash, in pro. per., for Defendant and Appellant.

Law Office of Cleidin Z. Atanous and Cleidin Z. Atanous, for Plaintiff and
Respondent.

Roger E. Naghash appeals a judgment entered after the superior court granted the motions of Mercury Insurance Company (Mercury) for terminating sanctions dismissing his arbitration against Mercury based on (1) Naghash's refusal to comply with the court's orders compelling document production and (2) Naghash's refusal to comply with the

court's orders compelling him to participate in the selection of an arbitrator. On appeal, Naghash contends the superior court erred in issuing the underlying order compelling further responses to inspection demands because: (i) the Code of Civil Procedure¹ does not allow for production when no action is pending and therefore conflicts with Insurance Code provisions authorizing discovery in underinsured motorist disputes; (ii) the court did not properly balance third-party privacy interests against interests compelling disclosure; (iii) Mercury did not provide prior consumer notice required by sections 1985.3 and 1985.6; (iv) the motion to compel was untimely because Mercury had previously requested the same documents without moving to compel; and (v) the order compelled production of attorney-client privileged documents. We are unpersuaded by Naghash's contentions regarding the court's discovery order.

We conclude the superior court did not abuse its discretion in issuing the order compelling document production because: (i) the categories of documents sought related to the amount of Naghash's disputed damages and were within the scope of discovery encompassed by Insurance Code section 11580.2, subdivision (f), and the Insurance Code did not conflict with the Code of Civil Procedure; (ii) the court properly balanced third-party privacy concerns as evidenced by the discovery order, which provided for redaction of individually identifiable information; (iii) the consumer notice provisions did not apply to the inspection demands; (iv) the motion was not untimely because substantial evidence

¹ All further statutory references are to the Code of Civil Procedure unless otherwise specified.

supported the court's determination that the inspection demands at issue differed from prior demands; and (v) the order explicitly allowed Naghash to redact attorney-client communications and therefore did not compel him to produce privileged documents. We further conclude the superior court did not abuse its discretion in ordering a terminating sanction based on Naghash's refusal to comply with its discovery orders, because Naghash demonstrated willful noncompliance with multiple prior orders and his repeated noncompliance and failure to pay prior sanctions established that imposition of lesser sanctions would be ineffective.

Because we affirm the judgment based on the court's order issuing a terminating sanction for Naghash's refusal to comply with discovery orders, we decline to consider whether imposition of a terminating sanction would be proper on the additional ground of his failure to comply with the court's orders relating to arbitration. Finally, Naghash contends the judgment should be overturned because the court's bias prevented him from receiving a fair hearing. We find no evidence of bias in the record or in the examples Naghash identified. We affirm the judgment of the superior court.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

In October 2010, Mercury issued a vehicle insurance policy to Naghash's wife, which policy listed Naghash as a covered driver. The insurance policy contained

provisions for uninsured and underinsured motorist coverage.² Later that same month, while driving a covered vehicle, Naghash was involved in an accident with two other vehicles. Juan Flores Galeana (Galeana) was driving one of the vehicles and Linda A. Hail (Hail) was driving the other. Naghash filed a claim with Mercury for underinsured motorist benefits following the accident and, in May 2012, asked Mercury to initiate arbitration after Naghash was unable to reach agreement with Mercury regarding the amount of his damages. In June 2012, Naghash wrote to Mercury, rejecting its suggested arbitrators and proposing arbitration "through JAMS." Naghash also sent Mercury a revised claim, seeking \$116,090 in damages, including \$10,000 for pain and suffering; \$50,490 for lost income; \$20,000 for loss of consortium; \$35,000 for emotional distress; and \$600 for miscellaneous expenses. In the same month, Mercury first propounded discovery on Naghash.

B. Procedural Background

On September 21, 2012, Mercury petitioned the superior court to assign it a case number so that it could compel Naghash to respond to the discovery propounded in June 2012 relating to his underinsured motorist claim (Mercury Case). Shortly thereafter, in a separate proceeding, Naghash filed a complaint against Galeana, Mercury and Hail

² With respect to claimed damages pursuant to uninsured or underinsured motorist coverage, the policy provided "determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement, between the insured or such representative and the company or, if they fail to agree, by arbitration." The policy further provided: "If the company and the insured are unable to agree on an arbitrator then each shall select an arbitrator of his choice. The arbitrators so selected shall agree on a single neutral arbitrator."

alleging negligence, bad faith and negligent and intentional infliction of emotional distress (Galeana Case).

1. *The Galeana Case*³

In November 2012, Mercury filed a motion to compel arbitration in the Galeana Case. The court granted the motion in January 2013. At a review hearing in August 2013, on finding that no arbitrator had been selected, the court, pursuant to the terms of the insurance policy, ordered each party to select its own arbitrator and those arbitrators were to select a third arbitrator to conduct the arbitration.

In January 2014, Galeana filed a motion to compel Naghash to submit to a deposition. Naghash opposed the motion, arguing the deposition was duplicative of his prior deposition taken by Mercury, and characterizing the deposition as occurring in the same case and involving the same parties and same issues. The court granted the motion, based on Naghash's admission in his declaration that the prior deposition was taken in a different case, and on his failure to cite any authority supporting his position. The court imposed monetary sanctions on Naghash. In February 2014, the court held a second review hearing to address the status of the arbitration and Mercury informed the court of its plans to file a motion to compel Naghash to take further action to proceed with the arbitration.

³ The Galeana Case is relevant to Naghash's appeal, as the two cases were eventually consolidated and the terminating sanctions were based on Naghash's conduct in both cases.

In March 2014, Naghash filed motions to compel Galeana to provide various discovery responses. Galeana opposed the motions, arguing (among other things) that his counsel had attempted to contact Naghash to request an extension several times prior to the response deadline, but Naghash never responded; Galeana had belatedly served verified responses; and Naghash should not be awarded sanctions because self-represented attorneys cannot recover attorney fee sanctions. Galeana's counsel also sought relief from waiver of Galeana's objections to the inspection demands or, in the alternative, a protective order to protect certain attorney-client privileged documents. The court heard oral argument and denied Galeana's motion for protective order (without prejudice), but granted Galeana relief from waiver; took Naghash's motions to compel discovery responses off calendar as moot; and awarded Naghash the costs of filing the four motions as sanctions. However, the court did not award Naghash his attorney fees because he was a self-represented litigant.

In April 2014, Galeana filed a motion to compel Naghash to answer deposition questions and produce documents, and also sought sanctions. Galeana contended Naghash had appeared for his deposition, but testified that he didn't know the answer to numerous questions ranging from his address to the nature of the accident, in every instance testifying that he would need to review his prior deposition transcript to answer the question, and Naghash further failed to produce any documents. In July 2014, the court granted Galeana's motion to compel, finding Naghash's conduct during the court-ordered deposition indicated "a contemptuous attitude toward the legal discovery process in general, and the court's February 5 order in particular," assessed sanctions against

Naghash and warned him that any further failure to comply with his discovery obligations "may result in the imposition of an evidence sanction, an issue sanction, or a terminating sanction, in addition to monetary sanctions."

2. The Mercury Case

In October 2012, Mercury filed a petition to obtain a case number and a motion to compel Naghash to provide verified answers to the June 2012 discovery, and sought sanctions. The court (the Honorable Charles Margines) denied the motion without prejudice, concluding it lacked jurisdiction over Naghash because Mercury did not personally serve Naghash with the petition to obtain a case number. Mercury personally served the petition on Naghash in February 2013.

In March 2013, Mercury filed a second motion to compel responses to the June 2012 discovery. Naghash opposed the motion on the ground the court lacked jurisdiction because no arbitration was pending. The court granted Mercury's motion in April 2013, finding the court had exclusive jurisdiction over the discovery dispute pursuant to Insurance Code section 11580.2, subdivision (f), and ordered Naghash to pay sanctions. In July 2013, in response to a notice of related cases, Judge Margines deemed the cases related and reassigned the Mercury Case to the Honorable Craig Griffin, who was presiding over the Galeana Case.

In November 2013, Mercury filed a motion to compel Naghash to submit to a physical examination or be precluded from seeking compensation for his alleged ongoing injuries. Naghash opposed the motion, arguing that his medical condition was not at issue because Mercury had already paid his medical bills and he sought only lost wages.

At oral argument, the court persuaded the parties to reach a stipulated resolution in which Naghash would either submit to the examination or waive seeking any damages for any residual medical condition.

In February 2014, Mercury filed a motion to compel further responses to its fourth set of inspection demands, which included: (1) a demand seeking Naghash's legal service agreements, "which tend to support" his lost earnings; and (2) a demand seeking all documents relating to Naghash's time and billing system, "which tend to support" his lost earnings. Both of the demands were targeted at specific categories of documents Naghash identified in his June 25, 2013, deposition as the only types of documents he could think of to support his lost earnings claim. Mercury was willing to forego seeking production of the documents if Naghash would agree not to produce them at arbitration. Naghash opposed the motion, contending the demands were essentially the same as those previously sought in Mercury's third set of inspection demands⁴ and the motion to compel was therefore untimely. Naghash also contended the documents sought were protected by attorney-client privilege and third-party rights of privacy, and repeated his argument that the court lacked jurisdiction to hear the motion because no arbitration was pending. Mercury replied, arguing Naghash's jurisdictional argument had been previously ruled on by the court, Naghash had failed to establish preliminary facts to support his privilege objections and the inspection demands were not untimely, because

⁴ The third set of inspection demands broadly sought all documents (from Jan. 1, 2008, to the present) relating to Naghash's billable and nonbillable hours, hours worked, hourly rates, rate categories and time entries, and all documents tending to support his claim he "spent less time" and "billed [fewer] hours" because of the accident.

the prior set of demands had been less specific and Naghash had objected to them as "vague" and "ambiguous."

In April 2014, following oral argument, the court partially granted Mercury's motion to compel as follows: (1) compelling production of documents with third-party names, addresses, phone numbers, court department numbers and case numbers redacted, allowing "redaction to attorney/client communication" and making the production subject to a protective order; (2) refusing to reconsider Naghash's jurisdictional argument that was the subject of Judge Margines's April 10, 2013, ruling; (3) finding Naghash did not lay a foundation for his claim of attorney-client privilege; (4) rejecting his claim that the discovery demands were untimely because they were duplicative of prior demands, as the demands at issue were more narrow than prior demands and he did not provide relevant legal authority for his argument; and (5) refusing to award sanctions to either party because Mercury had failed to address Naghash's third-party privacy objections and Naghash had not prevailed on his argument that he was not required to produce any documents and was, in any case, ineligible for fee sanctions as a self-represented litigant. At Naghash's urging, the court granted a 30-day stay of the order (until May 2014) to allow Naghash to file a writ petition, with an additional 30 days thereafter to produce the redacted documents.⁵ In May 2014, Mercury petitioned the court for an order directing Naghash to proceed with arbitration under Code of Civil Procedure 1281.2, by

⁵ Naghash did not file a writ petition during the 30-day stay, waiting approximately five months to do so, which petition was summarily denied.

compelling him to instruct the arbitrator he selected to propose an arbitrator to hear the underinsured motorist claim.

In July 2014, Mercury filed a motion for terminating sanction, based on Naghash's failure to comply with the court's April 2014 discovery order. Mercury argued that the only issue pending in arbitration was Naghash's claim for lost earnings and, because he refused to produce the documents he had identified as supporting his claim despite being ordered to do so, dismissal was appropriate. Naghash opposed the motion, arguing that the court's April 2014 order was unlawful and he was therefore not required to comply with it (citing *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 (*Costco*)), and repeating his arguments made in opposition to the motion to compel, including arguing, for the fourth time, that the court did not have jurisdiction to consider the discovery demands. Mercury replied, contending the opposition was, in essence, an untimely motion for reconsideration of the prior ruling and *Costco* was distinguishable.

Mercury's motion for terminating sanction and motion to compel Naghash to select an arbitrator were heard in September 2014. The court, on its own motion, consolidated the Mercury Case with the Galeana Case nunc pro tunc to April 30, 2014. The court denied Mercury's motion for terminating sanction, but ordered Naghash to produce the documents within 10 days, and warned Naghash that: **"THE COURT WILL HAVE LITTLE HESITATION IN DISMISSING THE ARBITRATION WITH PREJUDICE, THUS BARRING HIS CLAIMS, IF MR. NAGHASH DOES NOT TIMELY COMPLY."** Regarding the motion to compel Naghash to arbitrate, the court noted it had already ordered Naghash to proceed to arbitration in the Galeana Case,

and characterized Mercury's motion as one seeking to require Naghash to comply with a prior order. The court ordered Naghash to instruct his designated arbitrator to proceed with the process of selecting the third arbitrator within three court days, and the order included the following warning: **"A FAILURE TO OBEY THIS ORDER WILL SUBJECT MR. NAGHASH TO A DISMISSAL OF THE ARBITRATION WITH PREJUDICE, THUS BARRING HIM FROM RECOVERY ON HIS CLAIMS."**

Naghash did not comply with either of the September 2014 orders. In October 2014, Mercury filed a motion for a terminating sanction on the basis of Naghash's noncompliance with the April 2014 and September 2014 discovery orders and for a terminating sanction on the basis of Naghash's failure to comply with prior orders requiring him to proceed with arbitration. Naghash repeated all of the arguments he had previously raised in opposing Mercury's prior motion for terminating sanction based on his failure to comply with the April 2014 order, including arguing, for the fifth time, that the court did not have jurisdiction to enter the order because no arbitration was pending. In addition, Naghash claimed, for the first time, that he was unable to afford to pay the arbitrator, including a statement to that effect in his declaration, but he provided no other evidence to support his claim.

In December 2014, the court heard oral arguments of both parties, and issued an order granting Mercury's motion for terminating sanctions. The court observed that Naghash had repeatedly shown contempt for the court's orders in the consolidated cases, and raised arguments previously rejected by the court, demonstrating "willful obstruction of discovery and contempt of court"; refused to comply with prior monetary sanctions

imposed on him; and refused to comply with the September 2014 orders requiring him to produce documents and instruct his arbitrator to cooperate in the selection process. Because Naghash failed to pay prior monetary sanctions imposed against him and expressed a contemptuous attitude toward other orders of the court, the court did not believe monetary sanctions would be effective to compel his compliance. Moreover, because Naghash had expressed his view that he may ignore court orders he believes are improper, the court had no reason to believe he would comply. The court further noted Naghash had been clearly and unequivocally warned that his continued failure to comply with the court's orders would result in dismissal and yet continued to refuse to comply, compelling the conclusion that his noncompliance was willful. Naghash timely appealed.

DISCUSSION

A. Underinsured Motorist Claims

California law governing motor vehicle insurance imposes specific requirements on policy provisions providing uninsured and underinsured motorist coverage. (Ins. Code, § 11580.2.) For example, an uninsured or underinsured motorist coverage policy must provide that insurer and insured will arbitrate any disagreement as to whether: (1) the insured is legally entitled to recover damages; and (2) the amount of such damages.⁶ (Ins. Code, § 11580.2, subd. (f).) In addition, "[t]he arbitration shall be conducted by a

⁶ Although Insurance Code section 11580.2 refers primarily to coverage regarding an "uninsured motor vehicle," subdivision (b) clarifies that the term is defined to include "an 'underinsured motor vehicle' as defined in subdivision (p)" for purposes of section 11580.2. (Ins. Code, § 11580.2, subd. (b).)

single neutral arbitrator." (*Ibid.*) Furthermore, the procedures of the Civil Discovery Act (Code Civ. Proc. § 2016.010 et seq.) are applicable to determinations of uninsured or underinsured motorist coverage and "shall be available to both the insured and the insurer at any time after the accident, *both before and after the commencement of arbitration*, if any, with [various] limitations."⁷ (Ins. Code, § 11580.2, subd. (f), italics added.) The superior court in any county in which an action for recovery could properly be filed, or the superior court specified in the policy, has jurisdiction over the discovery. (*Ibid.*)

By incorporating the provisions of the Civil Discovery Act, Insurance Code section 11580.2, subdivision (f), authorizes a superior court to dismiss an arbitration as a terminating sanction for discovery abuses. (*Miranda v. 21st Century Ins. Co.* (2004) 117 Cal.App.4th 913, 926 (*Miranda*).) In *Miranda*, the plaintiff was injured in an accident with an underinsured motorist and demanded arbitration of her underinsured motorist claim against her insurer. (*Id.* at p. 917.) The insurer propounded discovery, but the plaintiff refused to sign authorizations allowing the release of her medical records, and the insurer filed an application with the superior court to commence discovery together with a motion to compel the plaintiff to sign the releases. (*Id.* at p. 918.) The court granted the motion to compel and the plaintiff refused to comply with the court's order. (*Id.* at p. 919.) The insurer filed a motion seeking a terminating sanction of dismissal of

⁷ The limitations include such things as limiting service (without leave of court) of deposition notices, interrogatories or requests for admission within the first 20 days after the accident, none of which apply here. (Ins. Code, § 11580.2, subd. (f).)

arbitration and the court granted the motion, dismissing the arbitration and imposing monetary sanctions on the plaintiff and her counsel. (*Ibid.*)

The plaintiff appealed, raising for the first time on appeal the argument that the court lacked subject matter jurisdiction to dismiss the arbitration. (*Miranda, supra*, 117 Cal.App.4th at p. 920.) The appellate court affirmed the dismissal, concluding Insurance Code section 11580.2, subdivision (f), provides the superior court with exclusive jurisdiction over discovery disputes for uninsured and underinsured motorist arbitration and, because the court was vested with the broad powers of the Civil Discovery Act, it "necessarily had the power to dismiss the case as a terminating sanction." (*Miranda, supra*, 117 Cal.App.4th at p. 926, citing former § 2023, subds. (a)(7) & (b)(4)(C).) The Court of Appeal further concluded the superior court did not abuse its discretion by dismissing the arbitration because the plaintiff acted in "defiant disobedience of the court's order" and it did not appear that lesser sanctions would suffice to remedy her noncompliance. (*Miranda*, at p. 929.)

B. Validity of the April 2014 Discovery Order

On appeal, Naghash does not dispute his intentional noncompliance with the superior court's orders that culminated in terminating sanctions. He instead argues that the superior court erred in issuing the April 2014 order granting Mercury's motion to compel for the following reasons: (1) the Insurance Code conflicts with the Civil Discovery Act and the discovery ordered was irrelevant and improper because there is no action pending; (2) the documents at issue were subject to third-party privacy rights that the court did not balance against interests compelling disclosure; (3) no consumer notice

was provided as required by sections 1985.3 and 1985.6; (4) the demands were the same as those previously served and the motion to compel was therefore untimely; and (5) the documents were subject to attorney-client privilege and should not have been ordered produced.

We review discovery orders for abuse of discretion. (*Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1124.) When there is a basis for the trial court's ruling and it is supported by the evidence, we will not substitute our opinion for that of the trial court. (*Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1515.) "We defer to the trial court's factual findings if they are supported by substantial evidence." (*Union Bank of California v. Superior Court* (2005) 130 Cal.App.4th 378, 388.)

1. *Conflict Between Civil Discovery Act and Insurance Code*

Naghash contends discovery is limited to information relevant to the subject matter of the "pending action" pursuant to former section 2017, subdivision (a) (now § 2017.010), and that provision conflicts with Insurance Code section 11580.2, subdivision (f), which he characterizes as providing "unfetter [sic] discretion" for an insurance company to conduct discovery on any subject matter. The Civil Discovery Act (§ 2016.010 et seq.) defines the scope of permissible discovery in relation to the subject matter of a "pending action," and the existence of that action is a prerequisite for obtaining relief. (*Department of Fair Employment & Housing v. Superior Court* (1990) 225 Cal.App.3d 728, 732.) However, the term "[a]ction," as used in the Civil Discovery

Act, is defined to include both "a civil action and a special proceeding of a civil nature."
(§ 2016.020, subd. (a).)

A "special proceeding" includes every remedy that is not an action. (§ 23; *People v. Yartz* (2005) 37 Cal.4th 529, 536 ["special proceeding of a civil nature" includes statutorily authorized civil commitment proceeding, as it is neither " 'an action at law [n]or a suit in equity,' " and instead is " 'commenced by petition independently of a pending action' "].) (*Yartz*, at p. 536.) A "special proceeding of a civil nature," therefore appears to include a court proceeding established to oversee discovery pursuant to Insurance Code section 11580.2, subdivision (f), as such proceeding may be commenced independently of any pending action and is neither an action at law nor a suit in equity. Consequently, there is no "conflict" between section 2017.010 and Insurance Code section 11580.2, subdivision (f), as the Civil Discovery Act governs discovery in special proceedings of a civil nature and Insurance Code section 11580.2, subdivision (f), provides for a particular civil proceeding to address discovery regarding uninsured or underinsured motorist claims.⁸

⁸ Moreover, even were there a conflict between the Insurance Code and the Civil Discovery Act, when faced with inconsistencies between a general and specific provision, the more specific provision is considered an exception to the general statute. (*Miranda, supra*, 117 Cal.App.4th at p. 924.) If the more specific statute is enacted after the general one, it is considered an exception or qualification of the prior statute. (*Id.* at pp. 924-925.) Insurance Code section 11580.2, subdivision (f), was enacted in 1961, and the provision is very specific, establishing a superior court's jurisdiction to apply the Civil Discovery Act only to issues of entitlement to damages for uninsured or underinsured motorist coverage and damages amounts. (Ins. Code, § 11580.2, subds. (f), (p).) In contrast, the predecessor to the section 2017.010, which generally limited discovery to "subject matter involved in the pending action" (former §§ 2016, 2031) was enacted in

Furthermore, contrary to Naghash's assertions that the discovery at issue would "prove nothing, since there is nothing at issue" and could not "remotely relate to any possible or imagined argument that Mercury has ever presented thus far," the discovery ordered was clearly relevant to Naghash's insurance claim and within the scope of the authorizing statute. Insurance Code section 11580.2, subdivision (f), applies to uninsured or underinsured motorist disputes regarding "whether the insured shall be legally entitled to recover damages" and "the amount [of those damages]" and further establishes that the Civil Discovery Act is "applicable to these determinations" and applies to discovery conducted "both before and after the commencement of arbitration." (Ins. Code, § 11580.2, subds. (b), (f).) Naghash had made a claim against Mercury for underinsured motorist coverage and sought arbitration when he and Mercury were unable to reach an agreement regarding the amount of his damages, including damages associated with his lost earnings. The document demands at issue sought two categories of documents to the extent they "tend[ed] to support" Naghash's lost earnings claim: (1) his legal services agreements and (2) documents relating to his time and billing records. As a self-employed attorney, those two categories of documents were the only evidence Naghash had been able to identify in his deposition to support his lost earnings claim. Because the discovery at issue related to the disputed damages amounts associated with Naghash's uninsured motorist claim, it was within the scope of discovery encompassed by Insurance

1957. (Stats. 1957, ch. 1904, § 3, pp. 3322-3324, 3332-3333.) The more specific Insurance Code provision would therefore constitute an exception to the general rule.

Code section 11580.2, subdivision (f), and Naghash cannot prevail on his argument that the court was not authorized to compel such discovery.

2. Attorney-client privileged documents

Naghash argues the court wrongfully ordered him to produce attorney-client privileged information. He relies on *Costco* for the proposition that discovery of confidential communications between attorney and client are barred irrespective of whether such communications also include unprivileged material. Naghash contends the documents he was ordered to produce, which he describes on appeal as including legal service agreements, accounting information, billing statements and correspondence between himself and his present and former clients, "are clearly protected by attorney [c]lient [p]rivilege." To support his argument, he cites Evidence Code section 954, subdivision (c) and the inspection demands themselves. However, Evidence Code section 954, subdivision (c) merely establishes an attorney as among those holding a privilege to refuse to disclose a confidential attorney-client communication, and does not purport to define what categories of information are deemed privileged. (Evid. Code, § 954, subd. (c).)

Mercury's inspection demands sought Naghash's legal services agreements and documents relating to his time and billing records, to the extent they supported his claim of lost earnings. Naghash asserted boilerplate objections to both demands, including (among numerous other objections) objecting "[t]o the extent" the demands sought information "within Attorney-Client Privileges." In opposing the motion to compel, Naghash did not provide any privilege logs or identify any specific documents responsive

to either demand for which any particular privilege applied. Although legal services agreements are protected by attorney-client privilege under California law (Bus. & Prof. Code, § 6149; *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 786), Naghash did not reference any legal authority establishing the privileged nature of those documents, and did not even mention the service agreements in his opposition to the motion to compel or at oral argument.⁹ In addition, Naghash did not reference *Costco* in his opposition or in oral argument. The court therefore concluded he failed to lay a foundation for his claim of attorney-client privilege and made no showing the subject documents contained any confidential and privileged information. The court ordered Naghash to produce the documents with various third-party identifying information redacted; the order also allowed redaction "to attorney/client communication."

Even though Naghash made an inadequate showing of privilege in opposing Mercury's motion to compel, attorney-client privilege is not waived so long as the

⁹ In any case, even if Naghash had a legitimate reason for withholding his legal service agreements, he had no excuse for not producing his billing records. California law is unclear regarding whether an attorney's *billing invoices*, sent to his client, are protected by attorney-client privilege and the issue is currently being considered by the California Supreme Court. (*Los Angeles County Bd. of Supervisors v. Superior Court* (2015) 235 Cal.App.4th 1154, 1160, review granted and opinion superseded by *County of Los Angeles Bd. of Supervisors v. Superior Court* (2015) 189 Cal.Rptr.3d 206.) Regardless, privilege does not shield underlying factual information from discovery, only the privileged communications themselves. (*Costco, supra*, 47 Cal.4th at p. 736.) Naghash's billing records cannot consist exclusively of communications with his clients, and any relevant noncommunicative portions of his billing records could have been produced with any privileged information redacted. (*Hartford Casualty Ins. Co. v. J.R. Marketing, L.L.C.* (2015) 61 Cal.4th 988, 1005-1006 [billing records may be produced with privileged information redacted]; *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1327 [same].)

responding party raises a timely privilege objection, regardless of whether the objection was insufficiently detailed (as part of a boilerplate response) or the responding party did not serve a privilege log. (*Catalina Island Yacht Club v. Superior Court*, *supra*, 242 Cal.App.4th at pp. 1129.) Consequently, a court abuses its discretion if it imposes a waiver of the attorney-client privilege as a sanction for failing to provide an adequate response to an inspection demand. (*Id.* at p. 1128.) Naghash argues that, like the order issued in *Costco*, the superior court's discovery order constituted an improper waiver of privilege. However, *Costco* is distinguishable, because the court in that case issued an order compelling production of an attorney-client privileged communication (an attorney's opinion letter) with redactions of only certain material within the communication. (*Costco*, *supra*, 47 Cal.4th at pp. 731, 740.) In contrast, although the superior court here partially granted Mercury's motion to compel, the court's order explicitly allowed him to redact attorney-client communications from his production. Naghash therefore could have complied with the court's discovery order without waiving his privilege objections.

3. *Third-party Privacy Rights*

Naghash likewise cannot prevail on his argument of error based on third-party privacy rights and the court's alleged failure to "balance" competing interests when ordering him to produce documents. He contends such balancing analysis requires a finding of " 'compelling need' " for the discovery and " 'the compelled disclosure [must] be narrowly drawn.' " However, Naghash cannot plausibly argue that there is no compelling need for the documents ordered produced, as he himself described such

documents as the only types of documents he could think of to support his lost earnings claim. Moreover, the court balanced the privacy interests of third parties against the need for discovery and provided appropriate limitations in issuing the April 2014 order. At oral argument, the court heard Naghash's arguments regarding third-party privacy and asked him detailed questions regarding the nature of identifying information disclosed in the documents. The court's order referenced *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 657-658 (describing the balancing test), and indicated the court relied on the case in considering how to design the scope of production to adequately protect third-party interests. The order required production of documents "with names, addresses, phone numbers and case numbers redacted," allowed redaction of any reference to court departments (which Naghash argued might allow someone to identify his clients) and attorney/client communications, and included a protective order, issued sua sponte, limiting use and disclosure of the documents to the arbitration and related proceedings. The record therefore does not support Naghash's argument the superior court "overlooked" third-party rights of financial privacy and erred in declining to balance competing interests in issuing the discovery order.

Naghash contends redacting nonparties' names is insufficient to protect third-party financial privacy interests, relying on *Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court* (1996) 51 Cal.App.4th 233. However, in *Hinshaw* the document at issue was a settlement agreement entered into by a group of doctors following litigation against a hospital, in which litigation Hinshaw originally had been a plaintiff. Therefore, the Court of Appeal concluded production of the settlement agreement with redactions to the names

of the plaintiffs (presumably known to Hinshaw or identifiable through court records) would not protect their privacy. (*Id.* at p. 242.) In this case, Naghash has not established that Mercury would be able to ascertain his clients' personal information from the redacted billing records. Unlike the trial court's order in *Hinshaw*, the court's order here sufficiently considered and addressed third-party privacy rights.

4. *Failure to Comply with Sections 1985.3 and 1985.6*

Naghash argues that the court erred in ordering discovery because Mercury did not comply with the notice requirements of sections 1985.3 and 1985.6. Sections 1985.3 and 1985.6 require a "subpoenaing party" to give notice to a consumer when subpoenaing certain personal records, including medical, financial, educational and legal records (§ 1983.5) and employment records (§ 1985.6). Here the documents containing third-party information were sought by inspection demands propounded on Naghash and he has not provided any authority establishing that a *subpoena* was required for the production. (*Snibbe v. Superior Court* (2014) 224 Cal.App.4th 184, 197 [custodian failed to establish that § 1985.3 applied when he offered no argument or authority that a subpoena was necessary].) Moreover, such notice is not required when the subpoena does not request the records of any particular consumer and the records are to be produced with customer identifying information redacted, as ordered in this case. (*Ibid.*; §§ 1985.3, subd. (i), 1985.6, subd. (h).) Naghash's argument regarding noncompliance with sections 1985.3 and 1985.6 is not persuasive.

5. *Repetitive Document Demands and Untimely Motion to Compel*

Naghash further contends that Mercury's motion to compel further responses to its fourth set of inspection demands was untimely because Mercury previously served a third set of similar demands and had not sought to compel further responses to the third set of demands. In the April 2014 order, the court rejected Naghash's argument, determining the demands at issue were not duplicative of prior demands because the newer demands were more specific and narrow. In addition, the court noted that the cases he cited were not on point. Naghash listed *Sperber v. Robinson* (1994) 26 Cal.App.4th 736 and *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403 in his opposition (and on appeal), but both cases merely held that failure to bring a motion to compel production of documents within the specified time period constituted a waiver of any right to compel further response, and neither case addressed the issue in the context of a second set of similar document demands. When an appellant does not support a contention with reasoned argument and citations to authority, we treat the contention as waived, as we are not bound to develop the appellant's arguments. (*Holguin v. DISH Network LLC* (2014) 229 Cal.App.4th 1310, 1322-1323, fn. 5.)

In any case, we find substantial evidence to support the court's determination that the requests were not duplicative. The prior requests had broadly sought all documents relating to Naghash's time worked, billing rates, billable and nonbillable hours, rate categories and time entries over a broad time period, and all documents supporting his claim he worked or billed fewer hours because of the accident. Naghash responded to the third set of document demands by objecting to the requests as vague, ambiguous and

overbroad and Mercury, rather than pursuing a motion to compel in light of Naghash's objections, chose instead to serve two targeted and less ambiguous demands for: (1) Naghash's legal service agreements, as identified by him in his deposition, that tended to support his claims of lost earnings and (2) documents relating to his time and billing system, as identified by him in his deposition, that tended to support his claims of lost earnings. Section 2031.310, subdivision (a) allows a party to bring a motion to compel if, among other things, the demanding party believes "[a]n objection in the response is without merit or too general." (§ 2031.310, subd. (a)(3).) Naghash has provided no authority that would preclude Mercury from declining to bring a motion to compel if it believed the objections raised had merit and instead issuing new demands that were clearer and more narrowly targeted.

After considering Naghash's contentions, we conclude the court did not abuse its discretion in issuing the April 2014 discovery order. Naghash claimed to have lost earnings while seeking medical treatment of injuries caused by the accident and Mercury sought discovery regarding whether he missed work during his course of treatment and, if so, whether he made up the time. The court's order compelling Naghash to produce such discovery, with redaction of third-party identifying information and any privileged communications, was reasonable under the circumstances.

B. Terminating Sanction for Noncompliance with Discovery Orders

Pursuant to section 2023.030, the court may impose various sanctions, including a terminating sanction, "against anyone engaging in conduct that is a misuse of the discovery process." (§ 2023.030.) A misuse of the discovery process includes, among

other things, "[d]isobeying a court order to provide discovery." (§ 2023.010, subd. (g).) More specifically, "if a party fails to obey an order compelling further response [to a demand for inspection], the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction" (§ 2031.310, subd. (i).)

We review a court's order issuing discovery sanctions for abuse of discretion and the "court has broad discretion in selecting the appropriate penalty." (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 604.) "We defer to the court's credibility decisions and draw all reasonable inferences in support of the court's ruling." (*Ibid.*) However, a court's decision to impose terminating sanctions is a drastic remedy and should generally not be imposed unless the court has unsuccessfully imposed less severe alternatives and/or the record establishes that lesser sanctions would be ineffective. (*Ibid.*; *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992 [court justified in imposing terminating sanction " 'where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules' "].)

We conclude the court did not abuse its discretion in imposing terminating sanctions. Naghash's failure to comply with the April 2014 and September 2014 orders compelling document production constituted a "misuse of the discovery process" eligible for terminating sanctions. (§§ 2023.010, subd. (g), 2023.030, subd. (d), 2031.310, subd. (i).) The record demonstrates that terminating sanctions were appropriate because

Naghash had exhibited a pattern of deliberate refusal to comply with the court's orders and lesser sanctions had proven ineffective. (*Miranda, supra*, 117 Cal.App.4th at p. 920.)

Throughout the course of the proceedings, Naghash repeatedly denied the court's jurisdiction over him, despite the April 2013 order deciding the issue. In April 2013, he was also ordered to pay monetary sanctions within 20 days but never did so. Moreover, although monetary sanctions were also included in the court's order compelling his deposition in the Galeana Case, Naghash appeared for the deposition but did not provide meaningful answers to the vast majority of questions, in flagrant disregard of the order. Furthermore, he did not comply with the September 2014 order compelling document production even after the court unequivocally warned him that he would be subject to a terminating sanction for noncompliance. In addition, because Naghash had previously expressed his view that he may ignore improper court orders, the court had no reason to believe further orders would have any effect. Under these circumstances, the court could reasonably infer that less severe sanctions would be ineffective and did not abuse its discretion in imposing a terminating sanction for Naghash's misuse of discovery.

C. Terminating Sanction for Failure to Comply with Arbitration Order

We affirm a judgment if it is correct on any theory, regardless of the trial court's reasoning. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) Considering our conclusion that the court did not abuse its discretion in terminating Naghash's arbitration for his failure to comply with the court's discovery orders, we need not consider the second part of the court's December 2014 order issuing the same sanction for his failure to comply with the court's orders regarding selection of an

arbitrator. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 346 [there can be no prejudicial error on review if the decision itself is correct, regardless of the reasoning relied upon].)

D. Judicial Misconduct

Naghash further contends he did not receive a fair hearing because the trial court's "personal biases and hatred towards" him was so "pervasive" that the court ruled against him "without facts, evidence or any law to support its conducts [sic]." He asserts the following examples: (1) the court "manufactured facts and evidence to justify its erroneous [December 2014] ruling;" (2) allowed other parties to claim attorney-client privilege but denied his privilege objections; (3) wrongfully ordered him to submit to a deposition by Galeana's counsel in the Galeana Case after being deposed by Mercury in the Mercury Case, but later consolidated the cases; and (4) imposed thousands of dollars in discovery sanctions against him but did not award him sanctions when he was the prevailing party.

Naghash's examples do not establish bias.¹⁰ First, he contends the court misconstrued facts to justify its erroneous ruling because the court stated in its tentative ruling that the documents sought were the only evidence of damages Naghash was seeking in arbitration and exclusionary or evidentiary sanctions relating to the documents

¹⁰ Multiple rulings against a party are insufficient to establish bias, particularly when the rulings are subject to review. (*People v. Fuiava* (2012) 53 Cal.4th 622, 732.)

would effectively prevent Naghash from obtaining recovery.¹¹ Naghash contends the trial court's statement was false because he had previously supplied Mercury with information supporting his claim for lost wages, including his medical records, depositions of treating physicians and Naghash's own deposition, among other things, and the court knew that its statements were false. However, Naghash had informed the court, under penalty of perjury in his declaration dated December 2013 that "MERCURY INSURANCE HAS **ALREADY PAID THE MEDICAL BILLS.** THE ONLY PORTION THAT IT HAS REFUSED TO PAY IS THE LOSS OF EARNINGS." In addition, portions of his deposition transcript had been filed with the court, in which Naghash identified the documents at issue as the only information he could think of to support his lost earnings claim. When he informed the court for the first time during oral argument on Mercury's second motion for terminating sanction that his lost income was not the only damage amount he sought, the court agreed to eliminate the disputed language from the order. Accordingly, the record does not support Naghash's portrayal of the court as "manufacturing facts and evidence" to wrongfully justify its ruling.

Second, Naghash contends the court ignored his privilege objections while holding that another party (Galeana) did not have to produce privileged information. His contention mischaracterizes the court's orders in both cases. As described above, the court's April 2014 discovery order allowed Naghash to redact all attorney-client

¹¹ Naghash filed a motion on August 18, 2015, seeking to include the superior court's December 3, 2014, tentative ruling in the record, which motion we granted.

privileged communications. In the Galeana Case, the court denied, without prejudice, Galeana's motion for a protective order relieving him from having to produce privileged information, finding Galeana had provided insufficient facts for the court to make that determination. Although the court granted Galeana's request for relief from waiver of objections and took Naghash's motion to compel off calendar, Naghash remained free to move to compel Galeana's production of any documents he believed were unjustifiably withheld as privileged. Such discovery rulings do not provide evidence of bias.

Third, Naghash argues that bias was inherent in the court's "wrongful" order compelling him to submit to a deposition by Galeana and awarding sanctions. However, it is apparent from the record that Naghash's deposition had not been previously taken in the Galeana Case, the two cases had not yet been consolidated at the time of the earlier deposition and, even if the deposition sought were considered a "subsequent deposition," pursuant to Code of Civil Procedure section 2025.610, subdivision (a), Galeana was not precluded from taking the deposition because he had never been served with notice of the prior deposition. There is nothing "wrongful" about the court's order compelling Naghash to submit to a deposition by Galeana's counsel that would suggest bias.

Fourth, Naghash argues bias was evidenced by the court's imposition of monetary sanctions against him, while refusing to award him attorney fee sanctions when he was the prevailing party.¹² However, the court refused to order payment of fees to Naghash in reliance on various cases holding that a self-represented attorney may not recover

¹² The court did, however, award Naghash costs in connection with his four motions to compel Galeana's responses.

attorneys' fees as discovery sanctions because he or she has not "incurred" such fees. (See, e.g., *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1180; *Kravitz v. Superior Court* (2001) 91 Cal.App.4th 1015, 1020). Naghash did not provide any authority distinguishing these cases either below or on appeal. Instead, he contends the court's ruling was biased because it awarded sanctions to Mercury and Galeana even though they were "represented by employees of the insurance companies." The record indicates that Mercury was represented by "The Law Office of Cleidin Z. Atanous" in the Mercury Case and by "O'Connor, Schmeltzer & O'Connor" in the Galeana Case, and Galeana was represented by "Law Offices of Francine B. Kelly & Associates." Naghash has not presented any evidence that these three law firms are employees or alter egos of the parties. In any case, our Supreme Court has held that a corporation "incurs" fees in paying its in-house counsel for its defense, unlike attorneys representing themselves. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1093.) Under these circumstances, any disparity in the award of attorney fee sanctions does not suggest court bias.

Furthermore, none of the cases Naghash relies on for his bias argument remotely resemble the circumstances of his case. Two of the cases involved jury trials and addressed the potential impact of the court's conduct on the jury and Naghash does not explain how the reasoning in those cases provides a basis for overturning the court's ruling in a nonjury proceeding. (See *People v. Sturm* (2006) 37 Cal.4th 1218, 1241; *Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994, 1008.) Moreover, in each of the cases on which he relies, the courts exhibited blatant prejudicial bias. (*Sturm*, at p.

1230 ["trial judge made inaccurate statements that prejudiced defendant and committed misconduct by persistently making inappropriate and disparaging comments directed toward defense counsel and defense expert witnesses"]; *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 457, 456-461¹³ [court refused to preclude testimony regarding plaintiff's immigration status in a personal injury action, stating (among other things) " 'he came here to work illegally. . . he's running the risk of getting injuries. . . . Tough. That's your problem.' "]; *Haluck*, at pp. 999-1001, 1002-1006 [court had ex parte contact with defense counsel, allowed him to repeatedly hum the Twilight Zone theme song when cross-examining plaintiff, used a penalty card scoring system to respond to objections (over plaintiff's counsel's objection) and made the comment "aren't they clever" regarding plaintiff's testimony].) In contrast, our review of the extensive record here reveals that the court made every attempt to consider Naghash's arguments (regardless of how poorly they were presented) and there is nothing to suggest the court's conduct was anything other than appropriate.

E. Naghash's Motion for Sanctions

Naghash asks us to impose sanctions on Mercury and its counsel under California Rules of Court, rule 8.276(a)(2), which authorizes a Court of Appeal to impose sanctions on a party or attorney for "[i]ncluding in the record any matter not reasonably material to

¹³ In addition, Naghash relies on language from *Hernandez v. Paicius*, *supra*, 109 Cal.App.4th at page 461 stating that due process may be violated by the mere appearance of bias, but that language was specifically disapproved by the California Supreme Court in *People v. Freeman* (2010) 47 Cal.4th 993, 1006, footnote 4.

the appeal's determination." Naghash contends "ninety (90%) of Mercury['s] Designation of Record is irrelevant and has nothing to do with any of the issues on . . . appeal," because Mercury designated the entire record in both the Mercury Case and the Galeana Case, including irrelevant documents, and the hearing transcript likewise includes multiple hearings when "only three (3) hearings could possibly be remotely related to the issues on appeal." We deferred ruling on Naghash's motion.

We have discretion to impose appropriate sanctions upon the parties or their attorneys. (*Ferguson v. Keays* (1971) 4 Cal.3d 649, 658.) However, sanctions should be used "sparingly to deter only the most egregious conduct." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 651.) We decline to award sanctions to Naghash.

As a threshold matter, we note Naghash's motion for sanctions contained broad statements regarding a few types of documents he categorized as "irrelevant and inconsequential" but included no specific citation to the record. On appeal, he raised the issue of court bias, devoting several pages to the argument in his opening brief and specifically referencing records from the Galeana Case multiple times, including a detailed discussion of the case in his statement of facts. As a result of Naghash's bias argument, any portion of the record reflecting his communications with the court or the court's communications with or about him were potentially relevant to his appeal (including all of his filings in the cases and transcripts of all hearings at which he was present or was referred to by the court). Furthermore, the appeal arose from the superior court's decision to grant terminating sanctions against Naghash for his failure to follow court orders (including discovery orders) and the court's decision relied in part on an

assessment of the potential effectiveness of sanctions based on his compliance history.

Therefore, as the majority of the record consists of parties' motions to compel Naghash's compliance with various forms of discovery, and the court specifically referred to the Galeana Case in its order granting terminating sanctions, we find the majority of the record designated was "reasonably material" to our determination of the appeal.

Although a small portion of the record does appear immaterial and we agree that Mercury should have exercised greater care in its designation, we do not find Mercury's conduct so unreasonable as to warrant sanctions.

DISPOSITION

The judgment is affirmed. The motion for sanctions is denied. Mercury is entitled to recover its costs on appeal.

O'ROURKE, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.